

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'D' BENCH: CHENNAI**

श्री यस यस विश्वनेत्र रवि, न्यायिक सदस्य एवं श्री जगदीश, लेखक सदस्य के समक्ष  
**BEFORE SHRI SS VISWANETHRA RAVI, JUDICIAL MEMBER AND**  
**SHRI JAGADISH, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.3295 & 3296/Chny/2016  
निर्धारण वर्ष /Assessment Years: 2010-11 & 2011-12

**The Income Tax Officer,**  
Ward-3,  
Tirunelveli.

**Vs.** A. Periasamy Nadar,  
[Rep. by legal heir Shri  
Gopalkrishnan (son)]  
No.9/101, Raja Veethi,  
Koodankulam,  
Tirunelveli – 627 657.  
**[PAN: BEOPP-1175-A]**

(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से/ Assessee by  
प्रत्यर्थी की ओर से /Revenue by

: None  
: Shri Suresh Guduri, JCIT

सुनवाई की तारीख/Date of Hearing

: 16.05.2024

घोषणा की तारीख /Date of Pronouncement

: 29.05.2024

**आदेश / ORDER**

**PER JAGADISH, A.M :**

Aforesaid appeals filed by the Revenue for Assessment Years (AYs) 2010-11 & 2011-12 arises out of the common order of Learned Commissioner of Income Tax (Appeals)-3, Madurai [hereinafter "CIT(A)"] dated 15.09.2016 in the matter of assessments framed by Ld. Assessing Officer [AO] u/s. 143(3) r.w.s 263 of the Income Tax Act, 1961 (hereinafter "the Act") on 29.10.2015.

2. At the time of hearing, none appeared on behalf of the assessee and therefore, we proceed to decide the case on merits.

3. The common ground raised by the Revenue in both the appeals is with regard to the direction of Ld. CIT(A) to reduce the income at 5% as against 8% of the gross contract receipts assessed by A.O.

4. We first take up the appeal for A.Y 2010-11. The brief facts of the case are that the assessee is an individual engaged in the business of supply of man power and selling firewood. A survey u/s.133A of the Act was conducted on 27.07.2012. Subsequently, a notice u/s 148 of the Act was issued to the assessee on 27.07.2012 and the assessee filed his return of income for A.Y 2010-11 on 07.01.2013 showing total income of Rs.3,60,000/- and agriculture income of Rs. 30,000/- for A.Y 2010-11. The assessee subsequently filed a letter dated 21.02.2013 offering income at 5% of the contract receipts. The A.O accordingly assessed total income of Rs.95,15,226/- against return of income of Rs.3,60,000/- vide order u/s. 143(3) r/w s. 147 of the Act dated 27.03.2013. Subsequently, the Ld. CIT, Madurai using his revisionary power u/s 263 of the Act, set aside the assessment order and directed AO to pass fresh assessment order in

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view of Section 44AD of the Act. The A.O passed order u/s 143(3) of the Act assessing income at 8% of the contract receipts. The assessee filed appeal before Ld. CIT(A) and the Ld. CIT(A) allowed the appeal holding as under:

**“ 2. Factual Matrix:**

*2.1. The appellant is an individual engaged in the business of supply of man power and selling firewood to M/s V.V. Mineral Company. assessment years, the appellant had not filed returns of income when survey u/s 133A was conducted on 27.07.2012. The Assessing Officer issued notice u/s 148 on 27.07.2012 for assessment year 2010-11 and notice u/s 142(1) for assessment year 2011-12. The appellant filed his return of income for assessment year 2010-11 on 07.01.2013 in response to notice u/s 148 admitting total income of Rs.3,60,000/-. Similarly, for assessment year 2011-12 the appellant filed his return of income admitting total income of Rs.4,80,000/-. The Assessing Officer completed the assessment proceedings on 27.03.2013 for assessment year 2010-11 determining the assessed income of the appellant at Rs.95,15,226/- and on 14.11.2013 for assessment year 2011-12 determining the total income of the appellant at Rs.99,94,690/-. Subsequently, the Commissioner of Income Tax-2, Madurai passed orders u/s 263 of the Income Tax Act dt.31.03.2015 for both assessment years on the ground that the Assessing Officer ought to have estimated the total income of the appellant at 8% of the contract receipts as provided in section 44AD whereas the Assessing Officer completed the assessments by estimating the profit at 5% of the contract receipts, which were erroneous and prejudicial to the interest of the revenue. The CIT clearly directed the Assessing Officer to redo the assessments afresh after giving the assessee a reasonable opportunity, even though the CIT was of the view that only 8% of the profit on gross receipts should have been assessed. The Assessing Officer completed the set aside assessment proceedings on 29.10.2015 for both assessment years against which the appellant has filed the present appeals. The issues involved in these appeals are discussed below.*

**3. Estimation of income**

*3.1 At the time of hearing the representative submitted that the Assessing Officer examined the facts of the case including the fact that the appellant did not have any asset and the past history of the case and assessed 5% of the contract receipts as income of the appellant whereas in the impugned order, the estimation of profit was enhanced to 8% of the contract receipts by relying on section 44AD. He submitted that section 44AD is applicable only where the turnover*

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of the appellant is less than Rs.40 lakhs for assessment year 2010-11 and less than Rs.60 lakhs for assessment year 2011-12. He contended that the eligible business defined in the Explanation below section 44AD clearly states that section 44AD is applicable only where the total turnover did not exceed Rs.40 lakhs or Rs.60 lakhs and, therefore, the Assessing Officer was not justified in applying section 44AD to the case of the appellant where the contract receipts exceeded Rs.40 lakhs or Rs.60 lakhs respectively. He further contended that in the case of Shri T. Durairaja (PAN:APRPD9205J) who is engaged in the similar business of supply of labour contract and sale of firewood, the Assessing Officer accepted and completed the assessment u/s 143(3) on 12.04.2013 estimating the income at 5% of the contract receipts and there was no reopening or set aside of assessment u/s 263 by the CIT and the above order has become final as the Assessing Officer cannot even reopen the assessment now as four year lapsed from the end of the assessment year. He contended that the Assessing Officer would not be justified in taking a different stand when compared to the case of Shri T. Duralraja as it would amount to giving different treatment in the cases of two similarly placed assessees.

3.2 I have considered the submissions of the representative. Admittedly, the original assessments in this case were completed by estimating 5% of the contract receipts as profits from the business on the ground that the appellant had not maintained regular books of accounts and penalty u/s 271A has also been levied for both years. This means that the appellant did not maintain the regular books of accounts and, therefore, the income is to be estimated. When the Assessing Officer completed the scrutiny assessments by estimating 5% of the gross receipts as business income, the CIT set aside the assessments on the ground that the income was to be estimated at 8% of the contract receipts by relying on section 44AD. The CIT-2, Madurai did not enhance the assessments but only set aside the assessments to the Assessing Officer as per para 7 of his orders. Subsequently, the Assessing Officer issued notices to the appellant and completed the assessments by estimating the income at 8% of the contract receipts on the ground that section 44AD is applicable to the appellant. But as per the Explanation below section 44AD only when the turnover is less than Rs.40 lakhs for assessment year 2010-11 and less than Rs.60 lakhs for assessment year 2011-12, the provisions of section 44AD will be applicable in cases where books of accounts were not maintained. Admittedly, the turnover of the appellant is far in excess of the above limits prescribed in the Explanation below section 44AD. Accordingly, it cannot be said that the provisions of section 44AD are applicable to the case of the appellant. Further, as contended by the representative in the case of another assessee by name Shri T.Durairaja (PAN:APRPD9205J) assessed by Income Tax Officer, Ward 1(1), Tiunelveli, the income was estimated at 5% of the gross

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*receipts while passing the scrutiny assessment order u/s 143(3) on 12.04.2013 for assessment year 2011-12. The above assessment order has become final as the same was not set aside u/s 263 by CIT or the assessment was reopened by the Assessing Officer within the period of four years ending on 31.03.2016. The Assessing Officer cannot reopen the assessment after 31.03.2016, as there was no failure on the part of the assessee to disclose the material facts. As contended by the representative the department also the Assessing Officer would not be justified in estimating 8% of the gross contract receipts as income of the appellant. In view of the above, the Assessing Officer is directed to adopt the total income as determined in the original assessment order.”*

5. The Ld. D.R supported the order passed by Assessing Officer and argued that the income should be estimated at 8% of the gross receipts in view of section 44AD of the Act. He also argued that the Hon'ble ITAT earlier had confirmed the order of A.O which was subsequently recalled.

6. We have considered the orders of the learned A.O and Ld. CIT(A) and the material available on record. During the course of survey, it was found that the assessee has contract receipts of Rs.10,51,87,340/- and sale receipts of Rs.7,79,17,180/- totaling to Rs.18,31,04,520/-. The assessee has offered 5% of the total receipts, which was accepted by A.O. Subsequently, the AO assessed the business income from contract receipts at 8% in view of Section 44AD of the Act as per observations made by Ld. CIT in the order passed u/s 263 of the Act. The Ld. CIT(A) has held that Section 44AD is not applicable in the case of assessee as the turnover is more than the

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limit prescribed in the explanation of Section 44AD of the Act. The Ld. CIT(A) has held that the Ld. AO has estimated the income from contract receipt at 5% in the similarly placed other assessee, which has become final, therefore estimate of 5% is justified. The Hon'ble Madras High court in the case of *K. Kannan vs. Assistant Commissioner of Income-tax, Circle-I in Tax Case (Appeal) Nos. 679 & 680 of 2013 in M.P. Nos. 1 of 2013 and 1 & 2 of 2013 dated 01.10.2013*, on similar facts has upheld the estimation at 5% of contract receipt as under :

*“As to the merits of the case herein is concerned, as already seen, the Commissioner of Income Tax (Appeals) considered the case of the assessee as regards the profit margin in the earlier years to fix the income at 5% of the gross turnover. Consequently, we do not find any justification in the Tribunal straightaway restoring the assessment at 8% of the gross turnover without any discussion on the merits of the Commissioner of Income Tax (Appeals) order. In the circumstances, after going through the order of the Commissioner of Income Tax (Appeals), we have no hesitation in restoring the order of the Commissioner of Income Tax (Appeals) and thereby set aside the order of the Tribunal.*

*11. Consequently, while partly allowing the appeals filed by the assessee, the Order of the Income Tax Appellate Tribunal is set aside and the order of the Commissioner of Income Tax (Appeals) is restored in fixing the income of the assessee at 5% on the gross turnover.”*

7. We find that facts of the case are similar to the facts of the above case decided by Honble High Court, supra. In view of above, we do not find any infirmity in the order of Ld. CIT(A) in restoring the income from contract receipts to 5% .

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8. We find that the identical issue is involved in Revenue's appeal in ITA No.3296/Chny/2023 for A.Y 2011-12, our adjudication for A.Y 2010-11 is *mutatis mutandis* applies to A.Y 2011-12 as well. Hence, this appeal in ITA No.3296/Chny/2016 is also dismissed.

9. In the result, both the appeals of the Revenue are dismissed.

*Order pronounced on 29<sup>th</sup> May, 2024.*

**Sd/-**  
(यस यस विश्वनेत्र रवि)  
(SS Viswanethra Ravi)  
**न्यायिक सदस्य / Judicial Member**

**Sd/-**  
(जगदीश)  
(Jagadish)  
**लेखा सदस्य / Accountant Member**

चेन्नई/Chennai, दिनांक/Dated: 29<sup>th</sup> May, 2024.  
EDN/-

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT, Chennai/Madurai/Coimbatore/Salem
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF